

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

764193

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HELEN KELLNER,

Appellant,

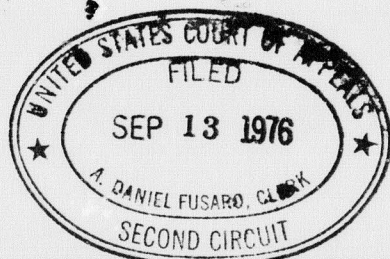
v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee

ON APPEAL FROM THE DECISION OF
THE UNITED STATES TAX COURT

BRIEF FOR THE APPELLANT
+ APPENDIX



HELEN KELLNER
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New York, N. Y. 10024

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TABLE OF CONTENTS

| | <u>Page</u> |
|--------------------------------|-------------|
| Statement of Issues Presented | 1 |
| Statement of the Case | 3 |
| Summary of Arguments | 4 |
| Arguments: | |
| I. Sick Pay | 6 |
| II. Home for Business | 7 |
| III. Employee Expenses | 8 |
| IV. Correction of Errors | 9 |
| V. Alimony Payments | 11 |
| VI. Dependent Care | 11 |
| VII. Medical | 12 |
| VIII. Charitable Contributions | 15 |
| Conclusion | 15 |
| Appendix | 16 |

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4193

HELEN KELLNER,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee

ON APPEAL FROM THE DECISION OF
THE UNITED STATES TAX COURT

BRIEF FOR THE APPELLANT

STATEMENT OF THE ISSUES PRESENTED

1. The right of appellant as a N. Y. C. teacher to exclude Sick Pay from her income as provided by law.
2. The right of appellant, who uses her apartment for business, to deduct a portion of the cost as a business expense.
3. The right of appellant to deduct for other employee expenses.

4. The right of appellant to correct mistakes she made in her original return because of her abnormal emotional condition.

5. The right of appellant to deduct for legal expenses in pursuit of divorce and alimony even though she was not successful in her pursuit.

6. The right of appellant to deduct for dependent care of her sick mother while she was away at work.

7. The right of appellant to deduct for various medical expenses.

8. The right of appellant to deduct about 2% of her income as charitable contributions.

Statement of the Case

A trial on this case was held before Judge Samuel B. Sterret from December 3, 1973 to December 12, 1973. During the several sessions Judge Sterret repeatedly asked for cooperative action to reach a conclusion. But the appellee would not comply. The trial was then continued. For reasons unknown to appellant it was continued for a year and a half until Judge Tannenwald was presiding in New York. The I. R. S. lawyers then threatened the appellant that she does not have a chance because Judge Tannenwald had ruled against her in the past. The trial was, as they foretold, held in an atmosphere of hostility and prejudice against the appellant.

The appellant is a resident of New York City and a teacher in the New York City public school system. Her compensation was \$11,345 in 1967 and \$10,337 in 1968.

She resides at 30 West 90th Street, New York, N. Y. 10024.

Summary of Arguments

I. The appellant has a right, like all the teachers in the nation and like other teachers of N. Y. C. to exclude Sick Pay from her gross income even though the method of computation used by the N. Y. C. Board of Education is not similar to some other methods used elsewhere. The appellant correctly excluded from her income \$1146

II. The appellant who is an art teacher uses her whole apartment for homework including the stove for baking clay and the bathroom for paints. For this reason she was disqualified from deducting for "Home as Business." The N. Y. C. Board of Education forbids the use of the classroom after 3.

The deducted portion of the cost is \$689

III. Quality supplies and books are essential for a teacher. Those offered by the City are meager. Teachers must offer parties to children and other enriching experiences. The appellant spends much more than the deduction \$750

IV. The appellant was in an abnormal emotional condition because of her mother's illness and death. Consequently she made many errors in her 1967 and 1968 tax returns.

She should be allowed to correct these since the returns are being reviewed.

V. The appellant should be allowed to deduct for legal expenses to obtain alimony even though her efforts were not successful.

\$750 for lawyer + \$239 for railroad fare + \$50 for lodging = \$1039

VI. Upon her mother's return from the hospital constant care was needed. The appellant had to go to work and hired people to attend to her mother. The cost was

\$600

There are no people who would work 8 hours for \$4.00.

VII. The bills submitted by appellant were decimated.

Neither the I.R.S. nor the judge below would review them.

Other items such as her expenditures for Hay Fever relief and food supplements were ignored by the judge below.

VIII. The appellant deducted about 2% of her income as

charitable deductions. She was disallowed that.

She should be allowed
and

\$335 for 1967
320 for 1969

ARGUMENT

I

Sick Pay Exclusion

"Taxpayers may exclude amounts of sick pay from their gross income if they meet the following three conditions:

1) They must have been absent from work because of sickness. 2) They must have been absent longer than the required waiting period." The appellant meets the first two conditions.

Condition No. 3 is that "the wages or payments must have been received under an accident or health plan."

There is no specification that the plan must be a particular one. Indeed the statute "does not define what is meant by a wage continuation plan" " in general it is an arrangement for the payment of amounts to employee"....

"and it is not necessary that the plan be in writing."

The petitioner's regular salary for 1968 was \$12,600

She was actually paid \$10,337

The deduction for 5 months of absence was \$2,263

The arrangement made by the Board of Education as demonstrated by the payments made to appellant fully satisfies Condition No. 3. It does not have to coincide with any preconceived notion of how the plan shall work.

Judge Sterret thought that the appellant was entitled to this deduction and it is generally agreed that teachers are covered for it. Judge Tannenwald ruled against appellant because the method of calculation is not similar to some other methods. This would rule out all New York City teachers from a ruling which was designed to be used nationwide. It would - if it were thus applied. But New York City teachers are allowed to claim Sick Pay Exclusion and only the appellant has been so prejudicially singled out.

II

Use of Home for Business

In 1967 and 1968 teachers were permitted to deduct for use of home for business. But Judge Tannenwald denied the appellant the right to do so on the ground that she used more of her apartment than did "Newi." Because she used it more she was disqualified completely. This defies all logic and justice.

She clearly showed how she used her apartment. She submitted testimony and diagrams ("Exhibit E"). She submitted checks for expenses. She used the kitchen for baking clay articles (the appellant is an art teacher), the bathroom for mixing paints and the other rooms for painting,

planning, draft work, writing, etc.

Judge Tannenwald states that a teacher's place of business is the school. The Board of Education now does not permit teachers to use their classrooms after 3, because of safety. Teachers, moreover, have traditionally done their work at home after school hours. It cannot be done while teaching 35 children.

The appellant must use her home telephone to call parents. The parents of her school are generally out during the day working. They can be reached only in the evening. The appellant provides many experiences for her pupils - visits to museums and other places of interest. Such visits with 35 children must be carefully planned by telephone at home. This cannot be done while teaching. There is no "extra time."

The petitioner failed to list this deduction for 1967 because of her emotional condition. There is no difference in her work between 1967 and 1968 and no reason why she should be cheated on her 1967 return.

III

Other Employee Business Expenses

\$150 for professional journals, books and supplies is

a very conservative figure. Petitioner spends much more. Parties for children have been traditional for ages. A teacher who does not provide them would be branded a scrooge. Most of them have a cultural teaching value. Candy, cake, presents, drinks and ice cream for about 35 children cost about \$100. Teachers are also expected to contribute to parents' parties.

School budgets are low. Art supplies provided by the school are meager and inadequate and it is necessary for the appellant to shop in art stores to decorate her room and arrange for meaningful art experiences for her children.

IV

The Right to Correct Errors Made in Original Return

The appellant's mother became mortally ill at the beginning of 1968. She died in July of that year. During that period the appellant nearly lost her mind. Her emotional and mental condition was not normal. And she could not do things correctly or with equanimity.

She filed her 1967 tax return when her mother was in the hospital and her 1968 return when the appellant was grief stricken with bereavement. Consequently both returns contain errors mostly of omission of deductions. These should be corrected. It is the appellee who culled these

forms for revision. The appellant, then, also has a right to correct errors at the same time.

The corrections are as follows:

A deduction for business use of her apartment in 1967 similar to the deduction in 1968. This item also involves the use of the fraction $2/8$ as decreed by Judge Hall, instead of the fraction $3/24$ as written by appellant, for determining the time used for business. The appellant did not add expenses for telephone - \$270, Repairs - \$210 and Decorations and Improvements - \$210.

2) \$750 for parties, candy, paper and paints for appellant's pupils and classroom - for 1967 and \$750 similarly for 1968.

3) Legal expenses to obtain a divorce and alimony. The correct amount should be \$150 for the lawyer and \$239.22 railroad fare and \$50 lodging. She incorrectly wrote \$300 for this item.

4) Correction of the figure \$125 for union dues to \$400, for both 1967 and 1968.

Judge Tannenwald off-handedly dismissed these corrections stating they were "vague." Appellant is capable of making statements clearly. The corrections are simple and understandable. Moreover, she has a right to make corrections even if they are in her favor, when the I.R.S.

has reopened the case.

V

Legal Expenses to Obtain Alimony

The appellant claims a deduction of \$1,039.22 for legal expenses to obtain alimony and divorce. This was denied by the judge in its entirety.

The appellant was not successful in obtaining alimony, but was granted the apartment and all its furniture instead. The fact that she was not successful in obtaining monetary periodic allotments should not disqualify her from deducting the expenses she made in pursuit of such grants.

VI

Dependent Care Expenses

Appellant's mother after a long period of hospitalization came to be cared for in appellant's home. But since the appellant had to go to work and her mother required constant care, it was necessary to hire people to attend while the appellant was out working. The cost for this was over \$600. The appellant incorrectly wrote \$210 in her original return.

Judge Tannenwald concedes that the expense was necessary. He allows for this purpose \$120 for the whole period.

The appellant was working from May 24 to June 30 encompassing 32 working days, from 8 A.M. to 4 P.M.

$\$120 \div 32 = \4.00 for an 8 hour shift.

What practical nurse would work 8 hours for \$4.00? The actual fees are \$38 - \$20 a day.

Again the argument seems to be that if appellant made a mistake in her favor it must be corrected. If the mistake was to her disadvantage she may not. She already explained the abnormal condition under which she made out her returns.

VII Medical Bills

The appellant's mother was mortally ill during the period in question and her medical bills were astronomically large even with help from Medicare. The appellee finds this irritating. But life does not always fit into the neat cubby holes envisioned by I.R.S. officials.

The list of the bills is long and the sorting of them is a tedious task. These bills were consequently decimated and the appellee's Exhibit C does not at all represent the entire picture. The shortcut was meant not only to shorten the trial but to shorten the list of bills as well.

Judge Sterret ordered that the parties retire to a separate room to review the documents. The appellees agreed reluctantly. But after ten minutes they became impatient and left. They would not review the documents, but whispered instead about confounding the appellant.

Some of the bills were excluded by the appellee for no reason at all, some were called duplicates when they were only similar (e.g., the same doctor or the same fee.)

The appellant made the allegations but to no avail. She finally found some duplicates of the bills lost or discarded and brought them to court to demonstrate what the I.R.S. officials had done.

Judge Tannenwald however ruled against appellant even though the matter was explained to him. He uses appellant's phrase "It would be too time consuming for the judge to review all those bills" out of context. It appears as if it were the appellant who finds it too time consuming." As a matter of fact when Judge Tannenwald presided over a previous year's case, the petitioner naively presented him with a large bundle of bills. He was so infuriated that his hostility to her continues to this day. The taxpayer is thus bounced like a ball between judges who won't (or haven't the time) to review large lists of bills and I.R. officials who know this and who simplify matters by discarding bills.

As for the matter of Hay Fever Relief and other items under the heading "Medical" Judge Tannenwald simply omits mentioning them.

Appellant submitted a letter from Dr. Lester Rothman advising refuge to a Hay Fever free area during the Hay Fever season. In 1967 she went to Ruidoso, New Mexico, 7000 feet high and Hay Fever free. In 1968 she went to Shandaken, New York, 2200 feet high, and Hay Fever free. The railroad fare alone was $\$49.16 + \$134.7 + \$55.38 = \239 .

The appellant suffers from acne and a tendency to diabetes. She was advised by Dr. Chargin, an eminent dermatologist to eat bunches of parsley in addition to other foods and not as a substitute for them. Parsley is not a substantial filling food which can be substituted for ordinary sustenance. Parsley is rich in vitamin A and does counteract her condition. The appellant submitted as evidence a prescription from Dr. Chargin and a letter from Dr. Katz, his associate. This matter was also ignored by Judge Tannenwald.

While it is true that the burden of proof is on the appellant, she is nevertheless entitled to a fair trial not a flagrantly prejudicial one. She has submitted substantiation but it was ignored or discarded. She should be credited with all the bills she submitted. She should also be credited with medical expenditures which common

sense dictates were made even if it was not possible to present bills for them.

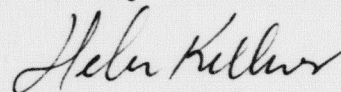
VIII
Charitable Contributions

The appellant claimed a \$320 deduction for charitable expenses, less than 3% of her income. Even that was denied her.

Conclusion

The appellant hopes that the persecution and vindictiveness against her ceases and that she be allowed her deductions for the foregoing reasons.

Respectfully submitted,



Helen Kellner
Pro Se

September 10, 1976

Appendix

Exhibit A Tax Return for 1967

Exhibit B Tax Return for 1968

Exhibit C Findings of Judge Tannenwald

Exhibit A

BEST COPY AVAILABLE

Form 1040

U.S. Individual Income Tax Return

U.S. Treasury Department, Internal Revenue Service

for the year January 1-December 31, 1967.

O.A.

1121211961124

1967

or other taxable year beginning 1967, ending 19

First name and initial (if joint return, use first names and middle initials of both) Last name Your social security number

Home address (Number and street or rural route) City, town or post office, and State ZIP code Spouse's social security number

Enter below name and address used on your return for 1966 (if same as above, write "Same"). If none filed, give reason. If changing from separate to joint or joint to separate returns, enter 1966 names and addresses.

Your present employer and address Spouse's present employer and address, if joint return

Your Filing Status—check only one: 1a ☐ Single 1b ☐ Married filing joint return (even if only one had income) 1c ☐ Married filing separately. If spouse is also filing a return, enter her (his) social security number in space provided above and give first name here 1d ☒ Unmarried Head of Household 1e ☐ Surviving widow(er) with dependent child

Your Exemptions Regular 65 or over Blind 2a Yourself 2b Spouse 3a First names of your dependent children who lived with you 3b Number of other dependents (from page 2, Part I, line 3) 4. Total exemptions claimed

Income If joint return include all income of both husband and wife Find tax from table OR Figure tax using tax rate schedules

5 Wages, salaries, tips, etc. If not shown on attached Forms W-2 attach explanation 6 Other income (from page 2, Part II, line 8) 7 Total (add lines 5 and 6) 8 Adjustments to income (from page 2, Part III, line 5) 9 Total income (subtract line 8 from line 7) 10 If you do not itemize deductions and line 9 is less than \$5,000, find your tax from tables in instructions. Do not use lines 11a, b, c, or d. Enter tax on line 12.

11a If you itemize deductions, enter total from page 2, Part IV, line 17. If you do not itemize deductions, and line 9 is \$5,000 or more enter the larger of: (1) 10 percent of line 9; OR (2) \$200 (\$100 if married and filing separate return) plus \$100 for each exemption claimed on line 4, above. Deduction under (1) or (2) limited to \$1,000 (\$500 if married and filing separately). 11b Subtract line 11a from line 9 11c Multiply total number of exemptions on line 4, above, by \$600 11d Subtract line 11c from line 11b. Enter balance on this line. (Figure your tax on this amount by using tax rate schedule on page 11 of instructions.) Enter tax on line 12.

12 Tax (from either Tax Table, see line 10, or Tax Rate Schedule, see lines 11a-11d) 13 Total credits (from page 2, Part V, line 4) 14a Income tax (subtract line 13 from line 12) 14b Tax from recomputing prior year investment credit (attach statement) 15 Self-employment tax (Schedule C-3 or F-1) 16 Total tax (add lines 14a, 14b, and 15) 17 Total Federal income tax withheld (attach Forms W-2) 18 Excess F.I.C.A. tax withheld (two or more employers—see page 5 of instr.) 19 Nonhighway Federal gasoline tax—Form 4136, Reg. Inv.—Form 2439 20 1967 Estimated tax payments (Include 1966 overpayment allowed as a credit) 21 Total (add lines 17, 18, 19, and 20) 22 If payments (line 21) are less than tax (line 16), enter Balance Due. Pay in full with this return 23 If payments (line 21) are larger than tax (line 16), enter Overpayment 24 Amount of line 23 you wish credited to 1968 Estimated Tax 25 Subtract line 24 from line 23. Apply to: ☐ U.S. Savings Bonds, with excess refunded or ☒ Refund only

Under penalty of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete. If prepared by a person other than taxpayer, his declaration is based on all information of which he has any knowledge.

Sign here Your signature Date Signature of preparer other than taxpayer Date

Spouse's signature (if filing jointly, BOTH must sign even if only one had income) Address

Please attach Copy B of Form W-2 here

Please attach Check or Money Order here

Your Tax, Credits, and Payments

Balance Due or Refund

7

Exemptions Complete only for dependents claimed on line 3b, page 1

(a) NAME (if more space is needed attach schedule) (b) Relationship (c) More than lived in your home. If born or died during year write "B" or "D" (d) Did dependent have income of \$600 or more? (e) Amount YOU furnished for dependent's support, if 100% write "ALL" (f) Amount furnished by OTHERS including dependent.

1 2 3 Total number of dependents listed above. Enter here and on page 1, line 3b

Income from sources other than wages, etc.

1a Gross dividends and other distributions on stock (list payers and amounts—write (H), (W), (J), for stock held by husband, wife, or jointly)

1b Exclusion (see instructions).

1c Capital gain distributions (see page 6 of instructions).

1d Nontaxable distributions (see page 6 of instructions).

1e Total (add lines 1b, 1c, and 1d).

1f Taxable dividends (line 1a less line 1e— not less than zero)

Interest (list payers and amounts below)

Earnings from savings and loan assoc. and credit unions.

Other interest (banks, bonds, tax refunds, etc.)

2 Total interest income

3 Pensions and annuities, rents and royalties, partnerships, estates or trusts, etc. (attach Sch. B)

4 Business income or loss (attach Schedule C)

5 Sale or exchange of property (attach Schedule D)

6 Farm income or loss (attach Schedule F)

Miscellaneous income (state nature and source)

7 Total miscellaneous income

8 TOTAL (add lines 1f, 2, 3, 4, 5, 6, and 7). Enter here and on page 1, line 6.

Adjustments to income

1 "Sick pay" if included in line 5, page 1 (attach Form 2440 or other required statement)

2 Moving expenses (attach Form 3903)

3 Employee business expense (attach Form 2106 or other statement)

4 Payments by self-employed persons to retirement plans, etc. (attach Form 2950SE)

5 TOTAL ADJUSTMENTS (lines 1 through 4). Enter here and on page 1, line 8

Itemized deductions—Use only if you do not use tax table or standard deduction. Medical and dental expense (not compensated by insurance or otherwise)—Attach itemized list.

1 One-half (but not more than \$150) of insurance premiums for medical care

2 Total cost of medicine and drugs

3 Enter 1% of line 9, page 1

4 Subtract line 3 from line 2 (not less than zero)

5 Other medical, dental expenses (include balance of insurance premiums for medical care not deductible on line 1)

6 Total (add lines 4 and 5)

7 Enter 3% of line 9, page 1

8 Subtract line 7 from line 6 (not less than zero)

9 Total (add lines 1 and 8)

Contributions—Cash—including checks, money orders, etc. (itemize)

10 Total cash contributions

11 Other than cash (see instructions for required statement). Enter total of such items here.

12 Carryover from prior years (see page 6 of instr.)

13 Total contributions (add lines 10, 11, and 12—see instructions for limitation)

Taxes—Real estate

State and local gasoline

General sales (see page 15 of instructions)

State and local income

Personal property

14 Total taxes

Interest expense—Home Mortgage

Other (itemize)

15 Total interest expense

Miscellaneous deductions.—(see page 9 of instructions)

16 Total miscellaneous

17 TOTAL DEDUCTIONS (add lines 9, 13, 14, 15, and 16). Enter here and on page 1, line 11a.

Credits

1 Retirement income credit (Schedule B)

2 Investment credit (Form 3468)

3 Foreign tax credit (Form 1116)

4 TOTAL CREDITS (for page 1, line 13)

EXPENSE ACCOUNTS—If you had an expense allowance or charged expenses to your employer, check here and see page 7 of instructions.

Medical Expenses

For 1923

| | |
|---|-----|
| Orthopedic Expenses back molds | 300 |
| Dr. R. B. St. John's Major | |
| Glasses | 40 |
| Has. Power Battery | 200 |
| Vitamins and Special foods in addition to other food as prescribed by Dr. Changin | 240 |
| 2000 of Dr. Changin's fees + \$50 deductible: Dr. Rastenberg, Maxwell, H. H. Rich, Devere, Changin, Fox, Green, Holman, Masters | 140 |
| Drugs not paid for by Med | 105 |
| Dentist Dr. Burt | 220 |

345 9 00

| | |
|---|-----|
| For Mother | |
| Heart Disease Dr. Lydick, Perrone Radisch | 230 |
| Dental Treat. | 480 |
| Shoes | 45 |
| Sa. T. Bathing Rheumatism | 380 |
| Swedish Sundry Treatments | 280 |
| Trimmers - 2 to 4 for Dr. Decker | 28 |
| Homeopathic for stomach disorders | 55 |
| Heating oil and Batteries | 480 |
| Drugs | 120 |

175 19 23

| | |
|-----|------|
| 175 | 1923 |
| 345 | 900 |
| 520 | 2823 |

Miscellaneous Deductions ... Part IV 17.
Employee Business Expenses

Professional Journals, Books Supplies

150

Union dues Professional Society 125

Protective Clothing Smocks — 20

Substitute Teacher — 275

Costumes Records lighting

Musical for school plays 75

Protective Clothing Smocks 25

670

Exhibit A

1040 U.S. Individual Income Tax Return U.S. Treasury Department, Internal Revenue Service 1968

First name and initial (If joint return, use first names and middle initials of both) HELEN Last name KELLNER Your social security number 124 12 6397

Home address (Number and street or rural route) 32 West 90th St City, town or post office, and State N.Y. ZIP code 10024

Enter below name and address used on your return for 1967 (if same as above, write "Same"). If none filed, give reason. If changing from separate to joint or joint to separate returns, enter 1967 names and addresses.

Your present employer and address Bd of Education 110 Avenue C Brooklyn, N.Y.

Your Filing Status—check only one:

1a ☐ Single

1b ☐ Married filing joint return (even if only one had income)

1c ☐ Married filing separately. If spouse is also filing a return, enter her (his) social security number in space provided above and give first name here

1d ☒ Unmarried Head of Household

1e ☐ Surviving widow(er) with dependent child

Your Exemptions Regular 65 or over Blind

2a Yourself ☒ ☐ ☐ Enter number of boxes checked 1

2b Spouse ☐ ☐ ☐

3a First names of your dependent children who lived with you

3b Number of other dependents (from page 2, Part I, line 3) Enter number 1

4 Total exemptions claimed 1

Income

5 Wages, salaries, tips, etc. If not shown on attached Forms W-2 attach explanation

6 Other income (from page 2, Part II, line 8)

7 Total (add lines 5 and 6)

8 Adjustments to income (from page 2, Part III, line 5)

9 Total income ("adjusted gross income") (subtract line 8 from line 7)

10 If you do not itemize deductions and line 9 is under \$5,000, find tax in tables on pages 12-14 of instructions. Omit lines 11a, b, c, or d. Enter tax on line 12a.

11a If you itemize deductions, enter total from page 2, Part IV, line 17. If you do not itemize deductions, and line 9 is \$5,000 or more enter the larger of: (1) 10 percent of line 9; OR (2) \$200 (\$100 if married and filing separate return) plus \$100 for each exemption claimed on line 4, above. Deduction under (1) or (2) limited to \$1,000 (\$500 if married and filing separately).

11b Subtract line 11a from line 9. Enter balance on this line

11c Multiply total number of exemptions on line 4, above, by \$600

11d Subtract line 11c from line 11b. Enter balance on this line. (Figure your tax on this amount by using tax rate schedule on page 11 of instructions.) Enter tax on line 12a.

12a Tax (Check if from: Tax Table ☐, Tax Rate Schedule ☒, Sch. D ☐, or Sch. G ☐)

12b Tax surcharge. If line 12a is less than \$734, find surcharge from tables on page 10 of instructions. If line 12a is \$734 or more, multiply amount on line 12a by .075 and enter result. (If you claim retirement income credit, use Schedule B (Form 1040) to figure surcharge.)

12c Total (add lines 12a and 12b)

13 Total credits (from page 2, Part V, line 4)

14a Income tax (subtract line 13 from line 12c)

14b Tax from recomputing prior year investment credit (attach statement)

15 Self-employment tax (Schedule C-3 or F-1)

16 Total tax (add lines 14a, 14b, and 15)

17 Total Federal income tax withheld (attach Forms W-2)

18 Excess F.I.C.A. tax withheld (two or more employers—see page 5 of instr.)

19 ☐ Nonhighway Federal gasoline tax—Form 4136, ☐ Reg. Inv.—Form 2439

20 1968 Estimated tax payments (include 1967 overpayment allowed as a credit)

21 Total (add lines 17, 18, 19, and 20)

22 If payments (line 21) are less than tax (line 16), enter Balance Due. Pay in full with this return

23 If payments (line 21) are larger than tax (line 16), enter Overpayment

24 Amount of line 23 you wish credited to 1969 Estimated Tax

25 Subtract line 24 from 23. Apply to: ☐ U.S. Savings Bonds, with excess refunded or ☒ Refund only

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete. If prepared by a person other than taxpayer, his declaration is based on all information of which he has any knowledge.

Sign here Your signature Date Signature of preparer other than taxpayer Date

Spouse's signature (If filing jointly, BOTH must sign even if only one had income) Address

Employees Business Expense
 under miscellaneous deductions Part TZ

Union dues, professional societies 125

Professional journals, books, lectures
 supplies 150

Costs of meals for lodging, music
 for work days. Protective clothing

Cards, prizes parties 75
 350

Exemptions Complete only for dependents claimed on line 3b, page 1

Form 1040-1958-Page 2

| (a) NAME (If more than one is needed attach schedule) | (b) Relationship | (c) Months lived in your home if born or died during year write "B" or "D" | (d) Did dependent have income of \$500 or more? | (e) Amount you furnished for dependent's support if 100% write "ALL" | (f) Amount furnished by OTHERS including dependent |
|---|------------------|--|---|--|--|
| 1 <u>Blanche Rierle</u> | <u>mother</u> | <u>D</u> | <u>NO</u> | <u>\$ ALL</u> | <u>\$</u> |

3 Total number of dependents listed above. Enter here and on page 1, line 3b 1

Income from sources other than wages, etc.

1a Gross dividends and other distributions on stock (list payers and amounts—write (H), (W), (J), for stock held by husband, wife, or jointly)

Total line 1a 624.33

1b Exclusion (see instructions)

1c Capital gain distributions (see page 5 of instructions)

1d Nontaxable distributions (see page 5 of instructions)

1e Total (add lines 1b, 1c, and 1d)

1f Taxable dividends (line 1a less line 1e—
not less than zero)

Interest (list payers and amounts below)

Earnings from savings and loan assoc. and credit unions.

Central Savings Bank 266.31

First National Bank 27.61

First National Bank 230.41

Other interest (on bank deposits, bonds, tax refunds, etc.)

2 Total interest income 624.33

3 Pensions and annuities, rents and royalties, partnerships, estates or trusts, etc. (attach Sch. B)

4 Business income or loss (attach Schedule C)

5 Sale or exchange of property (attach Schedule D)

6 Farm income or loss (attach Schedule F)

Miscellaneous income (state nature and source)

7 Total miscellaneous income

8 TOTAL (add lines 1f, 2, 3, 4, 5, 6, and 7).
Enter here and on page 1, line 6

Part III Adjustments to income

1 "Sick pay" if included in line 5, page 1 (attach Form 2440 or other required statement)

2 Moving expenses (attach Form 3903)

3 Employee business expense (attach Form 2106 or other statement)

4 Payments by self-employed persons to retirement plans, etc. (attach Form 2950SE)

5 TOTAL ADJUSTMENTS (lines 1 through 4).
Enter here and on page 1, line 8 1146.20

Part IV Itemized deductions—Use only if you do not use tax table or standard deduction.

Medical and dental expense (not compensated by insurance or otherwise)—Attach itemized list.

1 One-half of insurance premiums for medical care (but not more than \$150)

2 Total cost of medicine and drugs 215.00

3 Enter 1% of line 9, page 1 92.15

4 Subtract line 3 from line 2 (not less than zero) 116.85

5 Other medical, dental expenses (include balance of insurance premiums for medical care not deductible on line 1) 5606.50

6 Total (add lines 4 and 5) 5723.35

7 Enter 3% of line 9, page 1 250.53

8 Subtract line 7 from line 6 (not less than zero) 5472.82

9 Total (add lines 1 and 8) 5372.31

Contributions—Cash—including checks, money orders, etc.

(itemize) United Way 20 U.S.A. 20 Red Cross 20

1100 Club 10 PHL 10 Cancer 15 Cent. Fund 10

Portug. Soc. 15 CARE 20 U.S.A. 20 P.H.S.

Min. of H.S. 12 U.S.A. 10 B.S. 25

1000 Club 10 U.S.A. 10 Comm. 15 U.S.A. 15

10 Total cash contributions 5720.50

11 Other than cash (see instructions for required statement). Enter total of such items here

12 Carryover from prior years (see page 7 of instr.)

13 Total contributions (add lines 10, 11, and 12—see instructions for limitation) 320.00

Taxes—Real estate

State and local gasoline 50

General sales (see page 15 of instructions) 57

State and local income 342.74 + 66 408.74

Personal property

14 Total taxes 515.74

Interest expense—Home Mortgage

Installment purchases

Other (Itemize)

15 Total interest expense

Miscellaneous deductions—(see page 8 of instructions)

1100 Club 245

Employee Business Expense 250

16 Total miscellaneous 595

17 TOTAL DEDUCTIONS (add lines 9, 13, 14, 15, and 16). Enter here and on page 1, line 11a 6803.04

Part V Credits

1 Retirement income credit (Schedule B)

2 Investment credit (Form 3468)

3 Foreign tax credit (Form 1116)

4 TOTAL CREDITS (for page 1, line 13)

EXPENSE ACCOUNTS—If you had an expense allowance or charged expenses to your employer, check here [] and see page 6 of instructions.

Medical Expenses for my Mother

Repeated heart attacks

Balance for hotel room not paid by Medicare — \$1109¹⁵⁴⁵
at New York Hospital

Balance for heart specialists not paid by Medicare — 895¹²⁰⁰

Dr. Redwood, Dr. Perrone, Dr. Hyndick, Dr. Schaper, Dr. Hines, Chargin

Emergency ambulance, wheel chair, blood transfusions — 90

blood test - Keefe & Keefe, Sully Martin, Bad R Labs

Set of dentures — 300

Nursing Home - DeWitt Hospital - excessive charges not paid by Medicare — 46.20

Private nurse not paid by Medicare — 1516.00

Attendant at home enabling me to go to work — 310

Wearing band — 350

Gifts to nurses and attendants to obtain service 1.00

Taxis - mother too weak for other transportation 120

\$4736.20

Drugs not paid by Medicare

\$90

vitamins, salt

(over)

Medical Expenses for Myself

Dr. Goldstein, bar, no treatment \$150

Dr. Goldstein

Other doctors and dentists: Maxwell, Rich, Shepperd \$180

March, Chargin, Holman, Baker, Burt, Green

Levene, Fox, Silver

May, Silver Relief \$150

Vitamins, special foods in addition to regular
foods as prescribed by Dr. Chargin \$350

Glasses \$40

\$870

Drugs

\$125

Medical Expenses for Mother & Myself

\$4736

870

\$5606

Drugs & medical expenses

\$125

870

\$215

(over)

Sick Pay Exclusion

I was ill with Acute Respiratory Infection
from Feb 26 - May 29

I was not hospitalized

My normal rate of pay is \$12.000 +
weekly = $\frac{12000}{52} = \$230 +$ daily \$46 +

I was paid at the rate of \$20 per week
which is less than 75% of \$230 but more than \$100

My waiting period is 7 days

Feb 26 - March 7

Feb 26 - March 7 = 30 days at \$75 a week

$$\$75 \times 3 \frac{2}{7} = \$246$$

March 7 - May 29 at \$150 a week

$$\$150 \times 9 = \$900$$

$$\$1146$$

Use of Home for Work
under Miscellaneous Deductions Part II

I use my home to plan lessons
prepare materials for classwork and
mark papers for an average of 3 hours
a day $\left(\frac{3}{24} \right)$

Cost of maintaining home

\$8.81 Rent $\times 12 = \$1066$

Insurance 150

Cleaning 720

Utilities 72

\$1958

+ garage
+ maintenance

$\frac{3}{24}$ of \$1958 = \$245

I use the whole apartment including
a bathroom and kitchen to prepare
materials

T. C. Memo. 1976-72

UNITED STATES TAX COURT

HELEN KELLNER, Petitioner v. COMMISSIONER OF INTERNAL
REVENUE, Respondent

Docket No. 4724-71.

Filed March 9, 1976.

Helen Kellner, pro se.

Robert E. Marum and Warren W. Dill, for the
respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

TANNENWALD, Judge: Respondent determined the
following deficiencies in petitioner's Federal income
taxes:

| <u>Year</u> | <u>Deficiency</u> |
|-------------|-------------------|
| 1967 | \$838.49 |
| 1968 | 999.58 |

Certain concessions having been made by the parties, the issues remaining for our consideration are: (1) the availability of the sick pay exclusion for a portion of petitioner's 1968 gross income, (2) the amount of allowable medical and dental expense deductions available to petitioner for 1967 and 1968, (3) the amount of allowable employee business expenses incurred by petitioner in 1967 and 1968, (4) the deductibility of legal expenses incurred by petitioner in 1967 for divorce proceedings and for her alleged unsuccessful effort to secure an alimony award, (5) the availability of a deduction for expenses incurred in the care of a dependent in 1968, and (6) the amount deductible as charitable contributions for 1968.

To a large extent, the issues involved herein are factual in nature and petitioner bears the burden of proof in respect thereof. Welch v. Helvering, 290 U.S. 111 (1933); Rule 142, Tax Court Rules of Practice and Procedure. Further, since many of these factual issues involve the question of amounts actually expended by petitioner, this burden entails adequate substantiation of claimed expenses, a burden not unfamiliar to this petitioner. See Helen Kellner, T.C. Memo. 1971-103, affd. per curiam 468 F. 2d 627 (2d Cir. 1972).

Petitioner was a resident of New York, New York, at the time of filing the petition herein. She timely filed her Federal income tax returns for the years 1967 and 1968 with the district director of internal revenue, Manhattan District, New York. Throughout 1967 and 1968, petitioner was employed as a public school art teacher by the Board of Education of the City of New York. As a teacher, petitioner received compensation of \$11,345.62 in 1967 and \$10,337.19 in 1968.

Sick Pay Exclusion

Petitioner's annual salary was \$12,600 for the 1967-1968 school year, payable in twelve monthly installments of \$1,050 each. The payments which she received each month represented compensation for the month preceding the month previous to payment, e.g., she was paid in March for January, April for February, etc. It appears that, for each day of absence on account of illness not represented by fully-paid sick leave, 1/300ths, or \$42, was deducted from her compensation.¹

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Under the circumstances of this case, the fact that neither the teaching contract nor the bylaws of the Board of Education were put into evidence is immaterial. See Edward I. Weinroth, 33 T.C. 58, 60-61 (1959).

Petitioner was paid \$294 in April, 1968, \$420 in May, 1968, and \$294 in June, 1968. Since it is common knowledge that school sessions do not take place on Saturdays, Sundays, or legal holidays, during the week between Christmas and New Year's Day or during the week after Easter, or during the months of July and August, it is obvious, from the 300-day basis of calculation, that a substantial portion of petitioner's compensation was attributable to days on which she was not required to work. Compensation attributable to those periods does not constitute sick pay within the meaning of section 105(d).² Harry Cohen, 41 T.C. 181, 189 (1963). See Rev. Rul. 74-185, 1974-1 C.B. 34, modifying Rev. Rul. 63-219, 1963-2 C.B. 76.

Petitioner was absent on account of illness on February 9, 13, 14, 15, and 16, 1968, and from February 26 through May 24, 1968; she had sick leave available for all days of absence in February and March 1, 4, and 5. Petitioner was not hospitalized at any time due to such periods of illness.

The only days of absence on account of illness for which petitioner was paid were all such days in February and March 1, 4, and 5. The days of February 9, 13, 14,

²

All statutory references are to the Internal Revenue Code of 1954, as amended and in effect during the years in issue.

15, and 16 were separated from the period of continuous absence from February 26 to May 24 and therefore treated separately. See section 1.105-4(e), Income Tax Regs. Since it is obvious that petitioner's rate of regular pay was in excess of \$100 per week, that she was paid in full for each day of sick leave, and that the number of days in each separate period for which she was paid was less than 30 days, and since she was not hospitalized, the exclusion for sick pay contained in section 105(d) is inapplicable.³

We hold that, under the foregoing circumstances, petitioner is not entitled to any sick pay exclusion.

Medical and Dental Expenses

For the taxable years in question, petitioner claims to have made the following medical expenditures, incurred for the care of herself and her mother, for which she was

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Petitioner's situation is to be contrasted with that which existed in Harry Cohen, 41 T.C. 181 (1963), where the taxpayer had 122 days of accumulated sick leave. See 41 T.C. at 184.

not compensated by insurance or otherwise:

| | <u>1967</u> | <u>1968</u> |
|--------------------------------------|-------------|-------------|
| Cost of medicine and drugs | \$ 520 | \$ 215 |
| Other medical and dental expenses | 2,823 | 5,606 |

Respondent concedes that petitioner had the following expenses:

| | <u>1967</u> | <u>1968</u> |
|--------------------------------------|-------------|-------------|
| Cost of medicine and drugs | \$104.12 | \$ 167.29 |
| Other medical and dental expenses | 400.00 | 2,644.31 |

Notwithstanding petitioner's understanding that failure to establish her expenses could result in lost deductions (see Helen Kellner, supra), petitioner explains her lack of proof this way:

It would be too time consuming to review all those bills before the Judge. The petitioner therefore brought some random samples * * *.

Unfortunately, the Court has no way of knowing whether the bills which petitioner submitted in fact represent her expenses which respondent has conceded or the portion of those expenses which were disallowed. Under these circumstances, we have no choice but to hold that, except to the extent of his concessions, respondent's

determination must be sustained.⁴

Employee Business Expenses

For the years in issue petitioner deducted various amounts as employee business expenses. Respondent disallowed a portion of the claimed deduction for each year. After concessions by the parties, the items in dispute are:⁵

| | | <u>Claimed</u> | <u>Allowed</u> |
|--|------|----------------|----------------|
| Professional journals, books, supplies, etc. | 1967 | \$150 | \$50 |
| | 1968 | 150 | 50 |
| Protective clothing (smocks) | 1967 | 25 | 0 |
| Use of home for business | 1968 | 245 | 0 |
| Substitute teachers | 1967 | 275 | 0 |

4

The allowances of the amounts conceded by the respondent are subject to the 1-percent and 3-percent limitations of section 213.

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During the course of these proceedings, petitioner claimed to have understated her deductible expenditures on her tax returns. Since her petition makes no such claims and since petitioner's subsequent claims in respect thereof are vague at best, we consider her claimed expenses to be those shown on her income tax returns.

Petitioner has introduced no evidence showing she is entitled to a deduction in excess of the \$50 allowed her each year for the expense of professional publications, supplies, etc. Accordingly, we sustain respondent's determination concerning this item.

Although petitioner has similarly submitted no documentary proof regarding purchases of protective clothing smocks, we believe she did purchase such smocks and that the expense thereof was an ordinary and necessary expense of being an art teacher. We find petitioner's \$25 figure for 1967 to be reasonable.⁶ See Cohan v. Commissioner, 39 F. 2d 540 (2d Cir. 1930).

Petitioner testified that she used her apartment to prepare for her classes for several hours per weekday. She did not set aside any particular room or space for business use; the apartment had only two rooms, kitchen, and bath, all of which petitioner claims to have used for work.

Petitioner's situation is clearly distinguishable from that of a taxpayer who designates and uses a specified portion of his home for a convenient place of

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Petitioner took no separate deduction for this item in 1968 but included it in the general category of supplies, etc., and she offered no specific proof directed to this specific item for that year.

business he would not otherwise have. Cf. Newi v. Commissioner, 432 F. 2d 998 (2d Cir. 1970), affg. T.C. Memo. 1969-131. Petitioner's place of business was clearly the school at which she taught, and, to the extent she brought work home, she did not have a designated work space within her apartment.

We have dealt, in some detail, with the issue of "home" business expenses in a Court-reviewed opinion in Stephen A. Bodzin, 60 T.C. 820 (1973). Our decision therein was recently reversed by the Fourth Circuit Court of Appeals in Bodzin v. Commissioner, 509 F. 2d 679 (4th Cir. 1975). Whatever our views may ultimately be in respect of such reversal, we think it clear that petitioner herein has failed to carry her burden of proving facts sufficient to bring her within the parameters set forth in our opinion in Bodzin. We sustain respondent's disallowance of such expenses.

Petitioner's claimed deduction for substitute teachers' pay during her absence is clearly not allowable in view of petitioner's admission that she did not make payment to such substitute teachers from income taxable to her. See Helen Kellner, T.C. Memo. 1971-103.

Legal Expenses

Petitioner claimed a \$300 deduction on her 1967 tax return as legal expenses for her claimed unsuccessful pursuit of alimony. Respondent disallowed this deduction in its entirety. Petitioner on brief claims that the proper amount for this item is \$1,039.22.

Petitioner testified that she was divorced but denied alimony in 1967. Before we even reach the issue of whether or not her lack of success in getting alimony bars a section 212 deduction (see 4A Mertens, Law of Federal Income Taxation (Malone 1972 rev.), sec. 25A.07), we note that petitioner has failed to show that her legal expenses were not attributable solely to the procurement of the divorce decree. There is nothing in the record to indicate that petitioner made any claim for alimony in the divorce proceedings.⁷ Thus, we have no way of knowing how much, if any, of petitioner's legal expenses were incurred in connection with anything other than the cessation of the marital relationship. Accordingly, we must deem all of petitioner's legal expenses to be personal and nondeductible. See United

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In fact, appended to petitioner's brief is a photocopy of a canceled check to her attorney for such legal expenses. Petitioner's own notation thereon was "balance for divorce proceedings." (Emphasis added.)

States v. Gilmore, 372 U.S. 39 (1963). Compare Marion R. Hesse, 60 T.C. 685, 693-694 (1973), affd. without opinion 511 F. 2d 1393 (3d Cir. 1975), and cases cited therein. Respondent's disallowance is sustained.

Dependent Care Expenses

Petitioner's mother became quite ill in 1968. After a period of hospitalization, on May 22, 1968, petitioner's mother came to live with petitioner until her death in the summer of 1968. Since petitioner was away from home during the days school was in session from May 24 through June, and since her mother required constant care, petitioner hired persons to sit with her mother while petitioner was working. On her 1968 income tax return, petitioner claimed a \$210 deduction for dependent care under section 214. Respondent disallowed any deduction for dependent care solely upon the ground that petitioner failed to substantiate any expenditures of the nature claimed.

Although petitioner has failed to establish her expenses by documentary evidence,⁸ we believe the record as a whole supports a finding that petitioner

⁸ On her brief, petitioner argues that the amount she actually expended was \$600 and that we should accordingly allow an upward adjustment in her deduction. No claim for the additional amount appears in the petition and we have seen no evidence in support thereof.

expended \$120 for the care of her mother between May 24 and June 30, 1968, thereby enabling petitioner to be gainfully employed. The dependent care deduction should be figured accordingly.

Charitable Contributions

Petitioner claimed a \$320 deduction on her 1968 tax return for charitable contributions made. Respondent allowed \$150 of the amount claimed. In the absence of proof by petitioner that she is entitled to more, we sustain respondent's disallowance.

Decision will be entered
under Rule 155.